United Nations

AT

Administrative Tribunal

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26 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1078

Case No. 1149: BAKR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha Echols; Mr. Omer Yousif Bireedo;

Whereas, on 27 October and 7 November 1999, Mahmoud Ata Bakr, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency) filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 31 July 2000;

Whereas, on 26 July 2000, the Applicant filed an Application containing pleas which read as follows:

"***Section II***
Pleas

[The Applicant requests the Tribunal to:]

- Adopt the recommendation [contained] in the report of the [Joint Appeals Board (JAB)].

- [Provide him with a new job preserving his] grade and salary.
- [Convene] a new specialized Medical [Board], because [the Applicant does not show any signs of medical problems].

- [Compensate the Applicant] for the psychological harm [suffered] and for the lower achievement of [his] sons and daughters, the [illness] of his wife and mother, and the cost of treatment and transportations.

- Compensation for his injury."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 March 2000 and periodically thereafter until 31 August 2001;

Whereas the Respondent filed his Answer on 30 August 2001;

Whereas the Applicant filed Written Observations on 22 April 2002 and on 12 June 2002 the Respondent submitted comments thereon;

Whereas, on 29 June 2002, the Applicant submitted an additional written statement;

Whereas on 2 July 2002 the Tribunal put questions to the Applicant and the Respondent;

Whereas, on 10 July 2002, the Respondent provided answers to the Tribunal's questions;

Whereas the facts in the case are as follows:

The Applicant joined UNRWA as an Area staff member on a temporary indefinite appointment in the capacity of Driver "A", Grade 5, step 1, in the Gaza Field Office, on 1 December 1974. At the time of the events which gave rise to the present Application, the Applicant held the post of Ambulanceman, Grade 6, step 18.

On 13 August 1996, the Applicant was involved in an accident, while driving a water tanker. The Applicant suffered various injuries and was referred to Shifa Hospital for treatment. Following periodic medical examinations, the Applicant was excused from duty until 4

December 1996. On 5 December, the Medical Officer at the Gaza Town Health Centre found that, although the Applicant still suffered pain and stiffness of the neck, he was not disabled and could resume his duties. The Applicant did not return to work.

On 31 December 1996, the Applicant requested sick leave to be treated at his own expense outside Gaza, one week of which was approved, subject to a number of conditions.

On 3 April 1997, the Applicant wrote to the FPO requesting that the period of sick leave from 5 December 1996 to 1 April 1997 be counted as "a work injury". On 9 April, a Medical Board convened to examine his claim for disability but found him fit for service as from 5 December 1996 and agreed to re-evaluate his case six months later.

On 16 October 1997, a second Medical Board concluded that the Applicant was fit for work with the Agency as a driver, with a permanent disability estimated at 22 per cent. On 23 October, the Chief, Field Health Programme, Gaza (FHP), concurred with the Board's conclusions. On 2 November, the Chief, Medical Care Service, Headquarters, Amman, informed the Chief, FHP, that did not agree with the conclusions of the Medical Board that the Applicant should be considered fit for continued service as a driver "because of the limitation of motion of the cervical and lumbar regions"; that "as agreed through [their] telecon ... the conclusion of the Board should be amended to read unfit as a driver"; and, that he be provided "soonest possible" with the revised Medical Board proceedings for further action.

On 18 November 1997, following another review of the Applicant's case, the Medical Board determined that he was unfit for work as a Driver. On 8 December, the FAO advised the Applicant accordingly and informed him that his services would be terminated on medical grounds under Area staff rule 109.7 effective close of business 8 September 1998.

On 23 December 1997, the Applicant requested the Director of UNRWA Operations, Gaza, to review the contested decision, to place him on a suitable post, and to convene another specialist Medical Board.

On 25 February 1998, the Applicant was offered a position as Doorkeeper/Cleaner, Grade 1, step 20, effective 5 March 1998. On 3 March, the Applicant complained to the Officer-in-Charge, Administration Department, Gaza, that the offered position was not commensurate with his grade and salary. Following further correspondence on the matter, on 12 May 1998 the

Officer-in-Charge, Administration Department, Gaza, advised the Applicant that the Agency considered the case closed.

On 19 May 1998, the Applicant lodged an appeal with the Area Staff Joint Appeals Board (JAB). The JAB adopted its report on 24 May 1999. Its evaluation, judgment and recommendation read as follows:

> "III. EVALUATION AND JUDGMENT
>
> 29. ...
>
> (c) The Board noted that the Administration's offer of a transfer to the post of Doorkeeper/Cleaner grade 01, was not suitable and degrading for the Appellant as it was not only downgrading but also very far from his grade level.
>
> (d) In this context, the Board believes that the Administration should offer the Appellant a suitable post taking into consideration his age his grade and level.
>
> IV. RECOMMENDATION
>
> 30. In view of the foregoing ... the Board by majority vote makes its recommendation that the Administration's decision appealed against be reviewed."

In a dissenting opinion, the third member of the Panel stated:

> "... the Administration's decision is wrongfully issued because it was based on the fabricated decisions issued by the Department of Health and that the Appellant did not undergo any Medical Board.
>
> In this context, I am of the opinion that:
> (a) The Appellant should be given his old post and should be compensated for the damages that occurred to him during the period he was unemployed.
>
> (b) or, be transferred to a post with the same grade and level as he was before the accident.
>
> (c) or, be submitted to an actual medical Board, comprised of specialists in the Appellant's medical case, and that the recommendation of this Board would be final for the Appellant."

On 24 June 1999, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "I believe that the Board is incorrect. You were found *unfit for work as a driver* and had a temporary indefinite appointment. You were entitled to be transferred to a post (a non-driver post) which you could perform. The Administration offered you a post of Doorkeeper Cleaner, Grade 01. To balance the lower grade of the post and to protect your income, it offered you the position at Step 20. This was the only suitable vacancy it had to offer. Nevertheless, you rejected this offer. The Board made no suggestion or finding that the decision to terminate on medical grounds, following your refusal of alternative employment, had been biased, prejudiced, the subject of any procedural irregularity of breach of the Staff Rules and Regulations. In view of these facts, and the fact that the Administration was not required to create a new post for you, I have dismissed your appeal."

On 26 July 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. According to the Directorate of Medical Services, Public Security, Palestine National Authority, a medical examination showed that the Applicant is fit for military services.

2. As he does not show any signs of being incapacitated, he is fit to work as a driver.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's services in the interest of the Agency feel within the discretion of the Commissioner-General, and was not tainted by improper motive.

2. The Medical Board's proceedings did not violate the Applicant's due process rights.

3. The Respondent has no obligation to offer a staff member who is not capable of discharging the duties of his post for health reasons a transfer to another post with salary protection.

4. At the relevant time, the Respondent did not have any other suitable vacant post to offer the Applicant. He was not required to create such a post simply for the purpose of accommodating the Applicant.

The Tribunal, having deliberated from 28 June to 26 July 2002 now pronounces the following Judgement:

I. It is not surprising that the Applicant should have entertained perplexity and suspicion as to how the Administration reached the decision to terminate his appointment with the Agency on medical grounds and for him to have suspected that the said decision was made *mal fide* or made for an improper motive. This was so, not only because the facts and events giving rise to the decision were in themselves unusual but the situation was compounded by virtue of the Administration's failure to have kept the Applicant informed to what was going on and by reason of its regrettable failure, when advising him that the decision to terminate would not be changed, in failing to advert to his entitlement to be considered for appointment to any available alternative post which was within his capacity, and to offer him such a post or to explain why such an option was not being offered.

II. On 13 August 1996, whilst in the course of his UNRWA duties as a driver, the Applicant was driving a water tanker which overturned on the roadway as a result of which he suffered a variety of injuries which resulted in two prolapsed discs, one in his cervical spine and the other in the lumbar region.

These injuries were adjudged to be attributable to the performance by the Applicant of his official duties for the Agency.

Thereafter, the Applicant was placed on sick leave until 4 December 1996 and his fitness to resume his duties was assessed from time to time. On 5 December 1996, he was referred to Shifa Hospital where the Hospital Medical Officer diagnosed him as fit to resume his work as a driver and so certified his said diagnosis or opinion to the Agency. By a certificate of the same date, the Medical Officer, Gaza Town Health Centre, likewise certified his opinion that the Applicant would have no permanent disability.

It should be emphasised or noted that the opinions so expressed were opinions of Medical Officers rather than the opinion or finding of a Medical Board convened under the appropriate Staff Personnel Directive.

III. The Applicant did not return to duty on 5 December 1996 but rather sought an extension of his sick leave on the basis of a pre-accident urinary problem which he maintained had been exacerbated as a result of the water tanker accident. This request was refused by the Officer-in-Charge of the Curative Medical Division, who was of the opinion that the Applicant's urinary problems were unrelated to the said water tanker accident. That said Medical Officer further queried the assessment of the two certificates already referred to (one of which certified that he was fit to resume his work as a driver and the other which certified that he would have no permanent disability arising from his spinal injuries) and the said Medical Officer expressed his view that these matters should be addressed by a formal Medical Board.

It was intended to convene a Medical Board for 24 December 1996 to assess the degree of permanent disability as a result of the accident and to determine to what extent the Applicant's urinary problems related to the accident, but the Medical Board hearing was postponed at the request of the Applicant "*for family reasons*" and because the Applicant had departed to Egypt for medical treatment at his own expense.

The Applicant returned to Gaza on or about 3 February 1997. He was then complaining of some ongoing disability so he was referred to a Medical Board on 9 April 1997 to assess the percentage of his disability.

This Medical Board examined the Applicant on 9 April 1997. It found that he was fit to resume his work as and from 5 December 1996 but decided that a further six months should be allowed to lapse before deciding the extent (if any) of his permanent disability. The Applicant was advised accordingly.

IV. On 3 October 1997, a Medical Board was appointed to examine and to report upon the Applicant's medical condition and to assess the degree of permanent disability. Such examination took place on 16 October 1997 and the Medical Board expressed its opinion as to the degree of permanent disability, at 22% and expressed the opinion that he was fit to return to work as a driver.

The Chief, FHP, had initially concurred with the Medical Board's assessment that the Applicant was fit to resume duties as a driver, although he appears to have considered it to be "*a close call*".

He later discussed this assessment with the Chief, Medical Care Service, UNRWA Headquarters, Amman, who had accepted the Medical Board's finding as to the extent of permanent disability at 22% but who disagreed with its opinion that the Applicant was fit to go back to work as a driver, as he felt that the consequences or disability resulting from the Applicant having sustained two prolapsed discs would adversely affect his capacity to work as a driver, so that he would have constituted a danger to himself, his passengers or other road users.

This discussion raised doubts in the mind of the Chief, FHP, as to the issue of the Applicant's fitness to resume driving. Whilst the Chief, FHP, initially affirmed his decision that the Applicant was fit to resume work as a driver, he communicated with The Chairman of the Medical Board and they agreed to consult further with specialists in Shifa Hospital, some of whom had treated the Applicant in relation to his injuries. These doctors expressed the view that the restriction of movement of the Applicant's spine resulting from his accident was such that he should not resume driving duties.

When the Chairman of the said Medical Board then acquainted the other Board Members with the views which had been expressed by the specialists at Shifa Hospital and informed them of their views that the Applicant was not fit to go back to work as a driver, the Board on reconsideration of this issue changed from the views which it had earlier expressed and now concluded on reconsideration that the Applicant was not fit to resume driving duties. The Chief, FHP, then concurred with that changed opinion and this led to the decision to terminate the Applicant's appointment on medical grounds.

In the view of the Tribunal, the manner in which the change in the finding of the Medical Board was brought about was to say the least lacking in formality and may well have failed to conform with the appropriate Personnel Directive, A/6, Amendment No. 71, Add.1.

V. At paragraph 7 (B) of the said Personnel Directive, as amended, it is provided that where the Field Health Officer (now the Chief, FHP) finds that he is "unable to concur [with the conclusions of a Medical Board] either because the conclusions reached were not within the terms of reference set, or for other reasons, he should refer the proceedings back to the Chairman and [other Members of the Board], explaining why and requesting [them to reconsider] their conclusions". It would appear to this Tribunal that what was envisaged by the Personnel Directive was a detached and

formal intervention by the Chief, FHP, who was unable to accept the conclusion originally expressed by the Medical Board (as was the case here) and that the intervention should be by way of a formal reference of the proceedings back to the Board, that the grounds on which the Chief, FHP, was unable to accept the original conclusions of the Medical Board should be made in writing, rather than to have adopted the very informal procedure adopted by the Chief, FHP, in the instant case. The Tribunal considers that the said Chief, FHP, should have stood back from the reconsideration carried out by the Medical Board rather than to have participated therein as was done in the instant case. This is because in the view of the Tribunal the scheme envisaged that the Chief, FHP, should ultimately act upon the independent advice of the Medical Board rather than to have participated in the reinvestigation and to have encouraged the change of opinion ultimately made by the Board.

It appears to the Tribunal that the said Personnel Directive should have been implemented by way of a reconsideration by the Board of its original conclusions in the light of the reasons proffered by the Chief, FHP, as to why he had been unable to accept those conclusions and that the Chief, FHP, should not have been so actively involved or to have so extensively participated in the reconsideration, such as occurred in the instant case.

VI. The Tribunal further is of opinion that fairness and transparency and fundamental precepts of justice required that the Applicant should have been acquainted with the events as they occurred and that he should have been informed of the reasons why the Chief, FHP, was unable to accept the opinion of the Medical Board as originally stated, so that he would have been afforded an opportunity of participating in the reconsideration of the findings by the Medical Board, by making submissions thereto, or by furnishing medical reports or by otherwise intervening in such manner as he might see fit to do. In the instant case the Applicant was kept totally in the dark as to what was going on. All he may have known or all he appears to have been told was that the Board initially expressed the opinion that he was fit to resume work and that later this opinion was altered to an opinion that he was unfit to resume work as a driver, as a result of matters which, as far as he was concerned, were carried out behind closed doors. The Tribunal can well understand why in those circumstances the Applicant should believe that he has been treated unfairly. This case is akin to Judgement No. 906, *Ziadeh* (1998). para.II, where it found that the Applicant "was denied his

right to furnish evidence thereon or to challenge any evidence which may have been adverse to him. The Applicant was thus denied the rights protected by the principle of 'audi alteram partem', being analogous to the right to confront one's accusers. In short, the Applicant was denied due process".

VII. Notwithstanding the deficiencies or procedural errors highlighted above, the Tribunal does not find that the revised finding of the Medical Board was reached in a manner that so denied the Applicant his rights or denied him due process or fair procedure that it should be set aside. The Tribunal is satisfied that the revised decision was not reached in such an unfair manner or in violation of the Applicant's rights as should disentitle the Administration to rely thereon, in the decision it made thereafter to terminate the Applicant's appointment on medical grounds.

This is so because it is uncontrovertible that the Applicant had two prolapsed discs. The Medical Board's ultimate conclusion that this led to him being unfit to resume his duties as a driver was reached on cogent and rational grounds. The opinion that by reason of his two prolapsed discs his continuing work as a driver would constitute an unacceptable safety risk to himself, his passengers and other road users was a rational opinion. There is no evidence that the revised opinion was irrational or reached as a result of prejudice or on improper grounds. There is no evidence of bias, malice, prejudice or other improper motive. The Tribunal cannot seek to review matters of expert medical opinion by seeking to substitute the views of its individual Members on what are essentially medical matters, for those expressed by the Medical Board, provided the impugned medical opinion is on the face of it supported by evidence and is not shown to be irrational, prejudiced or based on extraneous or improper considerations.

The Administration's error in failing to keep the Applicant informed as to the events at the appropriate time and to allow him any meaningful participation in the reconsideration of his fitness to resume work, by the Medical Board, has caused the Applicant real perplexity and suspicion as to the motives of the Administration and to the reasons for his termination. It is likely that these grievances and his understandable feelings of lack of confidence in the Administration were compounded by the Administration's failure to address his entitlement to be considered for other suitable employment, when it initially told him that the revised findings of the Medical Board, that he was unfit to resume his duties, would not be changed. It is accepted

by the Administration that this matter ought to have been addressed from the outset and no explanation for its failure to do so has ever been offered other than surmise by the Respondent's Counsel that it might have been caused because there was no appropriate alternative job to offer to the Applicant at the material time. This explanation is inadequate. The inability of the Administration to provide a suitable explanation probably further compounds the Applicant's suspicions that he has been the victim of some sinister plot or that the Administration has entertained an improper motive for his said termination.

VIII. The Tribunal is satisfied that the administrative obligation to seek to accommodate the Applicant in an alternative job within his competence was ultimately discharged when it offered the Applicant a position as a Doorman/Cleaner at Grade 01, step 20, albeit that this would necessarily have resulted in a downgrading of the Applicant and in a reduction in his remuneration.

There is, however, no evidence to support the Applicant's suspicions that different alternative employment at his old grade was available. The evidence indicates that it was not. The Tribunal accepts that the Administration had no obligation to create another post especially for the Applicant. The Tribunal accepts that the offer ultimately made to the Applicant, albeit that it was made belatedly, was the best offer then available to the Administration to make, within the limitations of the vacancies available, so that by making it the Administration discharged its obligations to the Applicant in that regard. In light of these findings the Tribunal is satisfied that the Applicant was lawfully terminated but further finds that there were procedural irregularities and deficiencies, in the manner which has been identified above. As compensation to the Applicant for those irregularities which have caused him to suffer real distress and understandable loss of confidence as to the fairness of the way in which he was treated, the Tribunal awards him the sum of three months net base salary.

X. Accordingly, the Tribunal:

1. Orders the Respondent to pay the Applicant three months net base salary at the rate in effect on the date of his said termination: and,

2. **Rejects all other pleas.**

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha ECHOLS
Member

Omer Yousif BIREEDO
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary

United Nations AT

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1079

Case No. 1139: MACNAUGHTON-JONES
NG
RAO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President; Ms. Marsha Echols;

Whereas, on 17 July 1997, Viorica MacNaughton-Jones, Maria Luisa Ng and Michael Antony Rao, staff members of the United Nations who had served with the United Nations Iraq-Kuwait Observation Mission (hereinafter referred to as UNIKOM), with the agreement of the Respondent, filed an Application in direct submission under article 7 of the Statute of the Tribunal against a decision to characterize certain mission subsistence allowance (MSA) payments paid to UNIKOM staff as overpayments and to recover them as such.

Whereas, on 20 November 1998, the Tribunal rendered Judgement No. 902, *MacNaughton-Jones, Ng and Rao*. The Tribunal considered that "direct submission should only be made if the application concerns solely issues of law and if no material facts are in dispute". As the Tribunal found that the parties disagreed on a number of material facts, it "remanded [the case] to the [Joint Appeals Board (JAB)] for consideration on the merits".

Whereas, on 31 May 2000, the Applicants filed an Application containing pleas which read as follows:

"Section II: PLEAS

1. The Applicants request the Tribunal to rule that:

(i.) There was no excess of authority on the part of [the Chief Administrative Officer, UNIKOM,] to make .... MSA payments in respect of weekends, public holidays and days in lieu of weekends worked which fell during Applicants' period of annual leave.

(ii.) The payments in question did not violate staff rule 107.15(e).

...

(iv.) The MSA payments were not recoverable under staff rule 103.18 (b).

(v.) Even if the MSA payments were recoverable, the two-year recovery rule is applicable to limit such recovery to the last two years from the date of notice to recover.

(vi.) The adoption of General Assembly decision 51/440 of 16 December 1996 and resolution 51/234 of 13 June 1997 did not restrict the competence of the Tribunal to determine the validity of the recovery of the MSA payments, including the application of the two-year recovery rule.

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2000 and periodically thereafter until 31 August 2001;

Whereas the Respondent filed his Answer on 28 August 2001;

Whereas the Applicants filed Written Observations on 15 November 2001, and the Respondent submitted comments thereon on 4 June 2002;

Whereas the facts in the case were set forth in Judgement No. 902.

Whereas the JAB adopted its report on 2 November 1999. Its conclusions and recommendations read, in part, as follows:

"***Conclusions and Recommendations***

109. In conclusion, the Panel *unanimously agrees* that [the Chief Administrative Officer, UNIKOM,] exceeded his authority ... when he authorized payment of MSA to the [Applicants] for annual leave for which no MSA leave credits had accrued, for official holidays and official non-working days which fell during their annual leave for which no MSA leave credits had accrued, and for [compensatory time off] taken outside the mission area in conjunction with annual/home leave for which no MSA leave credits had accrued.

110. The Panel also *unanimously agrees* that the MSA overpayment represented a windfall to the [Applicants], who were not legally entitled to the money even with the passage of time, that the Organization remained the rightful owner of the MSA overpayments, and that it had the right to reclaim those overpaid public funds from the [Applicants].

111. The Panel *unanimously agrees* that there was no adequate evidence indicating that the [Applicants] had not received the MSA overpayments in good faith, and that consequently the two-year recovery rule applied to the present case. ...

112. The Panel also *unanimously agrees* that, in respect of the MSA overpayments paid to the [Applicants] for less than two years of their UNIKOM service, considerations of equity and fairness call for reimbursement to them for the expenses incurred during their authorized time-off without MSA credits, equal to an amount of fifty per cent of the recovered MSA overpayments. ...

113. Applying the above conclusions to the present case, the Panel *unanimously recommends* that, with respect to [the Applicant Ng] and [the Applicant Rao], who served in UNIKOM for less than two years and would not benefit from the two-year recovery rule, the Administration reimburse them fifty per cent of the recovered MSA overpayments. This would appear to amount to $3,120 for [the Applicant] Ng, and $3,450 for [the Applicant] Rao.

114. As for [the Applicant MacNaughton-Jones], who served for more than two years, the Panel *unanimously recommends* that the Administration (a) return to her the full amount of the recovered MSA overpayments relating to the period from 26 April 1991 through 28 October 1991, and (b) reimburse her fifty percent of the recovered MSA overpayments for the expenses incurred during her authorized time-off without MSA credits relating to her service in UNIKOM between 29 October 1991 through 28 October 1993.

..."

On 12 November 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicants and informed them as follows:

"...

[Letter to the Applicant MacNaughton-Jones] The Secretary-General is in agreement with the ... conclusions of the Board. He cannot, however, accept the Board's view that, in view of the fact that you received the MSA overpayment in good faith, the "two-year recovery rule" applies to your case. The Secretary-General notes that the two-year policy, which has never been promulgated as a rule to date, is superseded by the General Assembly decision 51/440 of 16 December 1996 and General Assembly resolution 51/234 of 13 June 1997, which do not limit recovery to a two-year period, but encompass all overpayments of MSA made to UNIKOM staff. The Secretary-General is obligated to implement the decision of the General Assembly and cannot, therefore, accept the Board's recommendation that you be reimbursed the amount of the recovered MSA relating to the period from 26 April 1991 through 29 October 1991.

The Secretary-General can also not accept the Board's recommendation that you be reimbursed fifty percent of the recovered MSA overpayments during your last two years of service with UNIKOM. The Secretary-General considers that the reasons offered by the Board for this recommendation, namely, that you were not at fault for the overpayment and that you had spent it in good faith, do not justify such a recommendation which, not only exceeds what you and your co-[Applicants] requested in your appeal, but is based on essentially the same considerations as the two-year recovery policy and thus effectively reduces the limitation on recovery from two years to one year.

[Letters to the Applicants Ng and Rao] The Secretary-General is in agreement with the ... conclusions of the Board. He has also noted the Board's conclusion that, as you served UNIKOM for less than two years, the two-year recovery policy is not applicable to your case. ...

The Secretary-General cannot accept the Board's recommendation that you be reimbursed fifty percent of the recovered MSA overpayments during your service with UNIKOM. ...

..."

On 31 May 2000, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants' principal contentions are:

1. There was no universal rule regarding the payment of MSA applicable to all missions during the relevant period.

2. The JAB erred in finding that the Chief Administrative Officer, UNIKOM, exceeded his authority in approving the payments.

3. The two-year limit on recovery is applicable in the circumstances; the decision by the Respondent to recover payments for a longer period caused irreparable harm to the Applicants.

4. General Assembly decision 51/440 of 16 December 1996 and General Assembly resolution 51/234 of 13 June 1997 do not override the principles of equity regarding limitation of recovery. Further, the matter was *sub judice* when General Assembly decision 51/440 was taken.

Whereas the Respondent's principal contentions are:

1. The Applicants received payment of MSA during their service with UNIKOM in excess of their entitlements under staff rules 103.21 and 107.15(e).

2. The Respondent has full authority and is obligated to recover overpayments made to staff members. Further, the Respondent is required to do so pursuant to General Assembly decision 51/440 of 16 December 1996 and General Assembly resolution 51/234 of 13 June 1997.

3. The Applicants did not acquire title to the amounts paid to them in error, retention of which would result in unjust enrichment.

4. The policy of equitable limitation of recovery to the last two years of overpayments is not applicable to the present case, and was precluded by the General Assembly's directives to the Secretary-General.

5. The Applicants should not be compensated on the grounds that recovery of the overpayments was arbitrary and caused the Applicants some hardship.

The Tribunal, having deliberated from 3 to 26 July 2002, now pronounces the following Judgement:

I. This case is a dispute concerning payments made to the Applicants as mission subsistence allowance (MSA) while they were on mission with UNIKOM. The Respondent sought the recovery of certain MSA payments and obtained reimbursement. The Applicants interpret the Staff Regulations and Rules, as well as the complex and largely incomprehensible

series of memoranda and communications on the subject, to mean that there was no overpayment and argue that, if they are incorrect, the two-year recovery rule applies.

II. UNIKOM was established by the Security Council in accordance with its resolutions 687 of 3 April 1991 and 689 of 9 April 1991. It was designated as a special mission as contemplated by staff rule 103.21. The mission staff worked under extremely difficult conditions, as described in the 1991 field audit report. Civilian staff in UNIKOM were paid MSA for annual leave for which MSA credits had not accrued, for holidays that fell during periods of annual leave and for compensatory time off outside the mission area during their annual leave, in part to compensate them for the harsh conditions. There was a great deal of criticism of payment rules and procedures, for their costliness and complexity.

A 1993 field audit of UNIKOM found a number of discrepancies from standard and correct procedures, in particular that the civilian staff at UNIKOM had been paid MSA for annual leave, for weekends and holidays which fell during the period of annual leave and for compensatory time off, for which no credit balances had accrued. The auditors recommended that UNIKOM conduct a review and recover the overpayments of MSA. Not until September 1996 did the Respondent give the Applicants notice that they were required to repay several payments made to them between April 1991 and October 1993. Following a hearing by the JAB on a request for the suspension of the recovery action, recovery was suspended until 31 December 1996 to allow an in-depth administrative review of the proposed action. Illustrating the controversy surrounding MSA payments in general, in its decision 51/440 of 16 December 1996 and resolution 51/234 of 13 June 1997, the General Assembly requested the Secretary General to recover overpayments of MSA paid during UNIKOM missions and to review the policies regarding MSA.

III. The JAB in its 1999 report described MSA as a

> "daily fixed allowance representing the total contribution of the Organization towards expenditures incurred by staff members in the field in connection with their assignment to a special mission ... Since conditions at most missions differ, application of a fixed set of guidelines for setting MSA rates would not be practical and therefore a variable standard is used."

This situation is reflected in staff rule 103.21 (b), which authorizes the Secretary General to "set the rates and conditions for the mission subsistence allowance payable on each such assignment". This authority was delegated in ST/AI/234/Rev. 1 of 22 March 1989, entitled "Administration of the Staff Regulations and Staff Rules", and amplified in ST/AI/1997/6 of 20 October 1997, "Mission Subsistence Allowance". However, staff rule 107.15 (e) limits the entitlement to 1½ days of leave with MSA earned for each month of completed special mission service.

ST/AI/234/Rev. 1 authorizes the Office of Human Resources Management to interpret the staff rule. As described by the JAB, the Field Administration and Logistics Division (formerly Field Operations Division) provides field mission administrators with direction, advice and guidance, administers the Staff Regulations and Rules for field staff, and is ultimately responsible for compliance. A mission Chief Administrative Officer is responsible for day to day operations and administration, including implementing MSA policies. Those policies were generally agreed to be opaque and difficult to administer. This is made clear by the factual findings in the 1999 JAB report.

IV. The Tribunal addressed the issue of recoveries in Judgement No. 986, *Steiner et al.* (2000). There it was said that

> "it is a general principle of law that monies paid by mistake ... are recoverable pursuant to the doctrine of unjust enrichment ... Further, under staff rule 103.18 (b) (ii) overpayments of the kind made in this case [MSA payments] can legally be recovered by deduction from salaries because there was an 'indebtedness to the United Nations', occasioned by the Applicants' unjust enrichment."

V. However, the right to recover is tempered by equitable considerations. As stated in Judgement No. 887, *Ludvigsen* (1998), the "true intent or justification for the doctrine of equitable limitation on recovery is to strike a fair balance between the interest in minimizing any hardship to an innocent recipient of overpayments and the interest in preventing misuse of public funds".

The Tribunal has varied the basis of its analysis of the proper equitable balance, citing, for example, equitable doctrine (*Ludvigsen*) or undue delay (*Steiner*). The Tribunal also considered in *Steiner* whether the procedure followed by the Respondent might have been flawed

or unfair. Thus, in applying an equitable test, the Tribunal can bar a claim when an unreasonable delay in pursuing the claim might have prejudiced the party against whom relief is sought. Moreover, any delay by the Respondent must be balanced against the short maximum one-year recovery period allowed to staff under staff rule 103.15 (ii).

An inordinate delay in beginning to recover overpayments might be unfair, especially when the staff member had left service before the recovery began, as the Tribunal has stated in several judgements. It found four years from the event giving rise to the claim for overpayment to be an "excessive delay" in Judgement No. 517, *Van Branteghem* (1991) ("such a course of action was not appropriate") and found a similar period of delay to be unjustifiable in Judgement No. 410, *Noll-Wagenfeld* (1988) ("negligence").

V. The Applicants contest the attempt by the Respondent to recover payment that had been made five years previously, relying on the Respondent's two-year rule.

The Applicants received their notices of recovery on 12 September 1996, years after the Applicants had left UNIKOM. The Applicant MacNaughton-Jones served with UNIKOM from 26 April 1991 through 28 October 1993; the Applicant Ng from 11 May 1992 through 28 June 1993; and the Applicant Rao from 24 April 1991 through 27 October 1992.

The Respondent contends that the two year rule is inapplicable because the Applicants were aware of the error or, at least, on notice that the recovery might be sought based on correspondence between the UNIKOM administrators that mentioned that the staff were "extremely concerned" about at least one of the methods for computing entitlements. The Tribunal does not agree.

As stated by the JAB, it was "doubtful that [the Applicants] could appreciate the meaning of the technical MSA rules ... given the fact that even the managers differed in their interpretations of those rules". The Tribunal will not hold the staff accountable for, and knowledgeable about, an error made by the Administration while it sorted out a highly complex and difficult to understand policy. Like the Applicant in Judgement No. 124, *Kahale* (1968), they "relied on [the Administration's] construction, ... assuming in good faith that the allowance was properly paid (and in spending it)".

VI. The Tribunal has often referred to the two-year rule applied by the Respondent, when considering the validity of recoveries. The rule was published in a 30 July 1987 memorandum from the Controller, who announced that

> "the Under-Secretary-General for Administration and Management has decided, until an appropriate policy is elaborated, to limit to two years recovery of overpayments made to staff members in cases where such overpayments are due to action of the Administration and not of the recipient and to suspend recovery beyond two years".

A subsequent 1995 memorandum from the Director, Financial Management Office, limited this policy to cases in which the staff member was genuinely unaware of the error.

The policy is interpreted by the Respondent to mean that the recovery will be limited to the last two years of overpayment, regardless of how ancient the claim. The Tribunal has accepted this interpretation, when it refers to the rule. According to the Tribunal in ***Steiner***, "it is clear that the decision refers to the recovery of overpayments relating only to the most recent two years. It does not state that recovery must begin no later than two years after the debt has been incurred."

Consequently, the Tribunal finds that the circumstances limit the possible recovery of the Respondent to the amounts, if any, that could be recovered under its own two-year rule.

VII. The Respondent also argues that the General Assembly demanded the recovery without regard to the two-year rule. The General Assembly certainly intended for the decision to be implemented under conditions that were fair to the staff concerned, who had served the Organization and its goals under difficult circumstances.

VIII. The dispute becomes one of whether equity bars the Respondent's claims in any way or whether the delays justify compensation for the Applicants.

In 1998, OIOS stated that the overpayments to UNIKOM staff, which had begun in 1991, were identified in a 1993 internal audit, "however, it was not until after a second field audit in 1995 that corrective measures were taken to revise payment procedures and initiate recovery actions". UNIKOM was noted for its tardy reaction to the report.

It is obvious that the Administration's confusion caused the overpayment. However, it is the conclusion of the Tribunal that equity does not require the Respondent to forego its right of recovery so long as it applies its own two-year rule.

IX. As explained herein, the Tribunal considers the equity of the recovery, even when the two-year rule applies and when it is implemented properly. *Steiner* stands in part for the view that delays, beyond those of the actual recovery period, may warrant compensation because of the harm and prejudice caused to the Applicants by the time gap between discovery and recovery. In this case the delay was almost twice as long as in *Steiner*. As we did in *Steiner*, the Tribunal finds the delay here was "difficult to justify" and it was unfair to the Applicants. This requires that the Applicants be compensated.

X. For the foregoing reasons and having considered the pleas, contentions and record, the Tribunal:

1. Decides that the two-year rule applies and that all recoveries should be limited to the last two years of overpayment, and orders that, therefore, the Applicants be reimbursed any amounts recovered in excess thereof;
2. Orders the Respondent to pay each Applicant $1,000 in compensation because of the delay described above; and,
3. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Marsha ECHOLS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary